

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

DON KING PRODUCTIONS, INC.,

Plaintiff,

v.

RAFAEL PANCORBO MARTINEZ, et
al.,

Defendants.

Civ. No. 06-2026 (JAF)

OPINION AND ORDER

Plaintiff Don King Productions, Inc. (DKP) filed this action against Defendants Rafael Pancorbo Martínez, his wife, and their conjugal partnership d/b/a Hotel & Restaurant La Pared Seafood; Carlos Rosado Santana, his wife Elsa I. Cintrón De Jesús, and their conjugal partnership d/b/a La Jamaca Restaurant & Catering; José Asencio García, his wife, and their conjugal partnership d/b/a Restaurant Reef Pop; Ismael Ramos Flores, his wife, and their conjugal partnership d/b/a la Casita Seafood Restaurant; Angel S. Toro Pérez, his wife, and their conjugal partnership d/b/a Negocio Gole; David Cordero, his wife, and their conjugal partnership d/b/a Los Balcones Restaurant & Sports Bar; Henry Pancorbo, his wife, and their conjugal partnership d/b/a Hotel Villa Parguera & Restaurant; Freddy Lugo, his wife, and their conjugal partnership d/b/a El Bohique Barra y Salón Billar; Guadalupe Ocasio Rodríguez, her husband, and their conjugal partnership d/b/a El Campesino; Wito

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1 Martell, his wife, and their conjugal partnership d/b/a La Nueva
2 Pinchera Martell; and Manuel Galarza, his wife, and their conjugal
3 partnership d/b/a Don Paco Café, on October 10, 2006. Docket Document
4 No. 1-1. The lawsuit alleges that Defendants violated the Federal
5 Communications Act of 1934, 47 U.S.C. § 605 (2002 & Supp. 2007), and
6 the Cable Communications Policy Act of 1984, 47 U.S.C. § 553 (2002 &
7 Supp. 2007), when they illegally and without authorization
8 intercepted, received, or otherwise assisted in the unauthorized
9 interception of receipt of the November 13, 2004, closed-circuit
10 telecast of a boxing event of which DKP was the producer and
11 copyright holder ("the event").

12 When Defendant Henry Pancorbo Ortiz, his wife, and their
13 conjugal partnership d/b/a Hotel Villa Parguera & Restaurant
14 (hereinafter collectively referred to as "Pancorbo Ortiz") failed to
15 respond to the complaint, Plaintiff requested, on February 19, 2007,
16 that this court enter a default judgment in its favor. Docket
17 Document No. 56. On February 27, 2007, we entered the requested
18 default judgment. Docket Document No. 57.

19 On March 12, 2007, Pancorbo Ortiz moved to have both the default
20 judgment and the entire underlying action against him dismissed under
21 Rules 12(b)(2) and 12(b)(4) of the Federal Rules of Civil Procedure,
22 arguing that this court lacks personal jurisdiction over him because
23 Plaintiff has never successfully served him with process. Docket
24 Document No. 59-1; FED. R. CIV. P. 12(b)(2) (establishing motion to

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1 dismiss for lack of jurisdiction over the person; FED. R. CIV.
2 P. 12(b)(4) (establishing motion to dismiss for insufficiency of
3 process). Plaintiff opposed the motion on April 2, 2007, Docket
4 Document No. 62-1, and Pancorbo Ortiz replied on April 5, 2007.
5 Docket Document No. 64-2.

6 Pancorbo Ortiz argues that Rule 4(m) of the Federal Rules of
7 Civil Procedure requires Plaintiff to serve him with process within
8 120 days of the filing of the complaint. Docket Document No. 59-1.
9 He points out that well over 120 days have by now passed from the
10 original filing of the instant litigation, and suggests that he is,
11 therefore, entitled to the dismissal of this action that he seeks.
12 Id.

13 Plaintiff responds by asserting that it *has* in fact served
14 process on Pancorbo Ortiz, and submits to this court an affidavit
15 from process server Carlos Santana swearing that

16 [o]n October 29, 2006 at approximately 6:15pm I
17 personally appeared at Hotel Villa Parguera,
18 located at Lajas, Puerto Rico to serve process
19 upon defendants, including Henry Pancorbo. . . .
20 I personally served the summons and a copy of
21 the complaint to a man who identified himself as
22 Henry Pancorbo Martinez This man was
23 approximately 68 years old, 5'8", weighted [sic]
24 approximately 165 pounds.

25 Docket Document No. 62-4.

26 Pancorbo Ortiz counters that the affidavit submitted by
27 Plaintiff only proves his point that he was never served. Docket
28 Document No. 64-2. For starters, he says that his name is Pancorbo

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1 Ortiz and so Santana's statement that he served someone named
2 Pancorbo Martínez is unavailing to show proof of service. Id.
3 Furthermore, Pancorbo Ortiz points out that the physical descriptors
4 Santana uses to describe the man he served process on do not jibe
5 with the fact that Pancorbo Ortiz' driver's license shows that he is
6 5'5" tall and weighs 145 pounds. Id. There are some other parts of
7 Santana's testimony that Pancorbo Ortiz attacks in making his case,
8 but we will stop cataloguing them here because we ultimately find
9 them irrelevant to our resolution of this dispute.

10 The complete text of Rule 4(m) of the Federal Rules of Civil
11 Procedure states that

12 [i]f service of the summons and complaint is not
13 made upon a defendant within 120 days after the
14 filing of the complaint, the court, upon motion
15 or on its own initiative after notice to the
16 plaintiff, shall dismiss the action without
17 prejudice as to that defendant *or direct that*
18 *service be effected within a specified time;*
19 *provided that if the plaintiff shows good cause*
20 *for the failure, the court shall extend the time*
21 *for service for an appropriate period.*

22 FED. R. CIV. P. 4(m) (Emphasis added). Reading the parties' filings
23 pertaining to this dispute, and taking them at their word, it is
24 clear that Plaintiff believed that Santana had effected proper
25 service of process on Pancorbo Ortiz on October 29, 2006, when in
26 fact he had only served process on some mystery person at Pancorbo
27 Ortiz' place of business who inexplicably chose not to inform Santana
28 of the error. Rather than punish Plaintiff for the mixup, we instead

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1 choose to vacate the default judgment we entered against Pancorbo
2 Ortiz, Docket Document No. 57, which he certainly did not deserve,
3 having never been properly served, and hereby **ORDER** Plaintiff to
4 effectuate service of process against Pancorbo Ortiz as legally
5 required **within the next thirty (30) days**. If Plaintiff fails to
6 achieve this in the next thirty days without good cause, Pancorbo
7 Ortiz should renew his request to have this action dismissed against
8 him. Until that time, we see no need to take more drastic measures.

9 For the foregoing reasons, we **deny** Pancorbo Ortiz' motion to
10 dismiss under Rules 12(b)(2) and 12(b)(4) of the Federal Rules of
11 Civil Procedure. Docket Document No. 59-1.

12 **IT IS SO ORDERED.**

13 San Juan, Puerto Rico, this 18th day of July, 2007.

14 S/José Antonio Fusté
15 JOSE ANTONIO FUSTE
16 U. S. District Judge